

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2003 -

In the Matter of Petitions for Reconsideration,
Of Order Making Determinations Pursuant to
Condition 10 of Decision 1632

WOLTER PROPERTIES LIMITED PARTNERSHIP;
MICHAEL P. GROOM, TRUSTEE FOR FREDERICK AND
PATRICIA HOLT; A. C. AND LINDA MARKKULA;
KOREAN SAMBOSA BUDDHIST TEMPLE; HOMESTEAD
HOMEOWNERS ASSOCIATION; CHUGACH & CO.;
RICHARD EVANS; RONALD R. KOONTZ;
NOVELLA NICHOLSON; AND BRUCE AND BETH STERTEN

Petitioners.

SOURCE: Carmel River

COUNTY: Monterey

ORDER AMENDING TABLE 13 WATER ALLOTMENTS

BY THE BOARD:

1.0 BACKGROUND

On July 6, 1995, the State Water Resources Control Board (SWRCB) adopted Decision 1632 (D-1632) which approved Application 27614 of the Monterey Peninsula Water Management District (District) for the proposed New Los Padres Project (now called the Carmel River Dam). Also on July 6, 1995, the SWRCB adopted Order WR 95-10. Order WR 95-10 includes a finding that downstream of river mile 15, the aquifer underlying and closely paralleling the surface watercourse of the Carmel River is a subterranean stream subject to the SWRCB's permitting authority. Order WR 98-04 amends this finding to extend upstream to river mile 17.2. These findings confirmed conclusions contained in an earlier Division of Water Rights (Division) staff report.

Following release of the staff report, some water users in the Carmel Valley filed water right applications for existing diversions from wells adjacent to the Carmel River. Although these applications had priority dates that were junior to Application 27614 of the District, they represented long-standing uses of water. These applications are listed in Table 13 of D-1632. D-1632 includes a finding that water is available for appropriation for those applications included in Table 13 and that the applications included in Table 13 would have priority senior to the District's Application 27614. Only applications for amounts equal to or less than the quantities listed in Table 13, based on documented past use, are considered to have a senior priority. The Notice of Hearing for Application 27614, which all potentially affected persons may not have received, did not include any issue related to making a finding of water availability for applications other than Application 27614 of the District, nor did it include any issue related to reversal of priority for existing uses.

In D-1632, the SWRCB directed staff to include the Carmel River on the list of fully appropriated streams for the period May 1 to December 31. Order WR 98-08 established this listing. The order finds "that after accounting for water needed for the projects specified in D-1632, the Carmel River is fully appropriated from May 1 through December 31 of each year." The projects specified in D-1632 include the District's Carmel River Dam project and those applications listed in Table 13. Again, all potentially affected persons may not have received notice of this action of the SWRCB.

Condition 10 of D-1632 provides a procedure for persons listed in Table 13 to seek an adjustment to the quantity specified in Table 13. The Chief of the Division of the SWRCB (Chief) is authorized to make adjustments to the quantities specified in Table 13 pursuant to criteria set forth in Condition 10.

On March 21, 1997, the Chief issued the Order Approving Revisions to Table 13 of Decision 1632 (Order). Thereafter, petitions for reconsideration of the Order were filed by:

1. Wolter Properties Limited Partnership;
2. Michael P. Groom, Trustee for Frederick and Patricia Holt;
3. A. C. and Linda Markkula;
4. Korean Sambosa Buddhist Temple;
5. Homestead Homeowners Association;
6. Chugach & Company;
7. Richard Evans;
8. Ronald R. Koontz;
9. Novella Nicholson; and
10. Bruce and Beth Sterten.

On June 19, 1997, the SWRCB adopted Order WR 97-03, which accepted all of the petitions for reconsideration of the Chief's Order but did not resolve the issues raised in the petitions. This order resolves those issues. It should be noted that the reversal of priority for applicants listed in Table 13 of D-1632 only applies with respect to the permit issued pursuant to D-1632 (Permit 20808, Application 27614).

2.0 CONDITION 10 OF D-1632

The Chief was required to act in accordance with the delegation of authority set forth in Condition 10 when he issued the Order. Petitioners seeking more water than is provided by the Order must demonstrate that they are entitled to the increased allotment in accordance with the criteria set forth in Condition 10. Condition 10 states:

The priority of this permit shall be junior to any permit issued on the applications set forth in Table 13 or for the persons named⁷⁷ in Table 13 for an amount of water not to exceed the quantity set forth in the column titled "*Quantity Reserved by SWRCB for Future Appropriation.*"⁷⁸ Applicants can request the State Water Resources Control Board (SWRCB) to modify the amounts in this column in accordance with the procedures in this condition.

⁷⁷ Several persons named in Table 13 do not have an application on file with the SWRCB.

⁷⁸ No quantity of water is set forth in Table 13 for Kirk, Lufkin, Lutes, Markkula, Pt. Sur Corporation, Tregga Trust, and Wolter [sic] because the hearing record does not contain adequate information; nevertheless, these persons may seek an application under the procedures established herein.

Persons identified in Table 13 that have not filed an application to appropriate water must file an application by December 29, 1995 to benefit from this condition. To the extent such applicants and persons claim riparian, overlying, pre-1914 appropriative or other rights to use the water, they shall not be entitled to a post-1914 appropriative right for water in excess of established quantities of use as a result of this permit condition. Any priority obtained for a permit by virtue of this condition shall be void if the permittee and/or others divert more water under the permit and claimed underlying rights than is authorized on the face of the permit; however, the priority shall not be voided for the diversion of de minimis amounts which can reasonably be attributed to operational uncertainties.

Upon request by an applicant, a protestant, or the District, notification to the District and petitioner, and opportunity for comment, the SWRCB will review whether the amount set forth in the column entitled "*Quantity Reserved by SWRCB for Future Appropriations*" should be increased or decreased, at such time as an application is processed; however, no reconsideration will be provided for amounts based upon a stipulation between the District and an applicant except in those instances where the stipulation is subsequently revised or new stipulation is entered into by the District with respect to Table 13 quantities.

Request for review shall be submitted and accompanied by prima facie evidence of established quantities of use to the Chief, Division of Water Rights, on or before December 29, 1995. Requests for review submitted after this date shall not be considered. The criterion for review shall be whether the applicant had an established reasonable beneficial use of water and the amount of such use⁷⁹ on or before November 22, 1994. Only recorded water use for the period January 1, 1987⁸⁰ through November 22, 1994 shall be considered. The Chief, Division of Water Rights, is delegated authority to modify the quantities identified in Table 13. This condition is not a restriction on exercise of valid riparian, pre-1914 appropriative, or post-1914 appropriative rights which are senior to the permit issued pursuant to Application 27614, or valid rights to diversion of percolating groundwater.

(D-1632 at pp. 97-98.)

3.0 WOLTER PROPERTIES LIMITED PARTNERSHIP (WOLTER)

Table 13 did not allot any water to Wolter. In accordance with Condition 10, Wolter requested that its allotment in Table 13 be increased to 96.0 acre-feet per annum (afa). The Order allotted

⁷⁹ Recorded water use shall be based either on records of meter readings or well production records.

⁸⁰ Limited meter readings are available for the Carmel River Valley beginning in 1987.

Wolter 37.4 afa. Wolter filed a petition for reconsideration in which it requests an allotment of a minimum of 60 afa or approximately 96 to 100 afa for the “conduct of full intensive farming operations.” (Petition for Reconsideration, p. 3.)

In its petition, Wolter contends that:

1. The measure of the water right is the amount of water put to reasonable beneficial use.
2. The allotment of 37.4 afa is not supported by substantial evidence.
3. There is relevant evidence to establish the amount of its established reasonable beneficial use of water that was not presented to the SWRCB because the evidence did not comply with the criteria set forth in Condition 10.

Wolter’s circumstances are unique. Wolter has submitted evidence of the malfunction of its water meter. The malfunction of its meter caused underreporting of water use on its property. Wolter submitted both water meter readings and well production records to comply with the requirements of Condition 10. The Chief relied on the meter readings in allotting Wolter 37.4 afa in the Order. The Chief did not rely on the well production records because the pump efficiency tests were not submitted to validate the use of the records and the well production records were therefore considered unreliable. Wolter submitted other methods and data to estimate water use on its property with its Petition for Reconsideration. The conclusions reached using the alternative methodologies and data corroborate the well production records. The well production records show that Wolter used approximately 62 afa of water on its property. Therefore, it is appropriate to rely on the well production records under the unique facts and circumstances of Wolter’s case. The SWRCB finds that Wolter’s Table 13 allotment should be increased to 62 afa.

4.0 MICHAEL P. GROOM, TRUSTEE FOR FREDERICK AND PATRICIA HOLT (HOLT) AND A. C. AND LINDA MARKKULA (MARKKULA)

Markkula bought the Holt property; consequently, the two petitions have been consolidated. Table 13 did not allot any water to either Holt or Markkula. In accordance with Condition 10, Holt requested an allotment of 210 afa and Markkula requested an allotment of 454.02 afa. The

Order allotted Holt 10.6 afa and Markkula 88.5 afa. Holt and Markkula then filed petitions for reconsideration in which they request an allotment of 210 afa and 454.02 afa, respectively.

In their petitions, Holt and Markkula contend that:

1. They extract groundwater from wells in the Tularcitos basin that is not subject to the permitting authority of the SWRCB.
2. The SWRCB has abused its discretion by ignoring the Protest Dismissal Agreement between them and the Monterey Peninsula Water Management District (MPWMD).
3. The Order is inconsistent with the Declaration of Fully Appropriated Streams.
4. The allotments of 10.6 afa and 88.5 afa are not supported by substantial evidence.
5. Limiting water use to 10.6 afa and 88.5 afa will cause the existing farming operations to cease, which is a significant impact under the California Environmental Quality Act (CEQA).

Holt and Markkula extract groundwater from wells in the Tularcitos basin of the Carmel River watershed. Decision 1632 did not address the legal classification of groundwater in the Tularcitos basin. The information submitted by Holt and Markkula shows the groundwater extracted from its wells is percolating groundwater that is not subject to the SWRCB's permitting authority. The SWRCB does not contend and has no information to show that the groundwater extracted by Holt's wells is part of a subterranean stream flowing through known and definite channels. An investigation to determine the legal classification of the groundwater extracted by Holt's wells and Markkula's wells in the Tularcitos basin was conducted by Division staff. The staff investigation concluded that neither Holt's wells nor Markkula's wells are located within a subterranean stream. Accordingly, the SWRCB finds that Holt's wells and Markkula's wells are not located within a subterranean stream and are not subject to the permitting authority of the SWRCB. The applications filed to authorize diversions from Holt's wells and Markkula's wells in the Tularcitos basin should be canceled and they should be removed from Table 13 of D-1632. It is not necessary to address the other issues raised in the petitions because of the lack of permitting authority of the SWRCB in these two cases.

5.0 KOREAN SAMBOSA BUDDHIST TEMPLE (TEMPLE) AND HOMESTEAD HOMEOWNERS ASSOCIATION (HOMESTEAD)

The Temple and Homestead are not listed in Table 13. The Temple requests an allotment of 8 afa. Homestead requests an allotment of 29.6 afa. Both petitioners complied with Condition 10. Both petitioners contend that the SWRCB failed to provide them with notice of the proceedings.

Only those persons who: (1) filed applications for diversion from the Carmel River watershed, (2) had statements of Water Diversion and Use on file with the SWRCB,¹ or (3) submitted protests against the District's application were given notice of the hearing and were considered for inclusion in Table 13. Other potentially affected persons were not given notice of the hearing directly, nor were they notified of the determinations of Order WR 95-10 or D-1632 or the need for existing users to be included in Table 13 to obtain a valid basis of right for their diversions.

The SWRCB failed to give both the Temple and Homestead adequate notice of the proceedings. Further, the SWRCB failed to provide adequate notice to groundwater pumpers, including the Temple and Homestead, that the SWRCB would be considering findings of water availability of applications besides Application 27614.

We find that:

- (1) The requests of the Temple and Homestead that they be included in Table 13 for the amount of their historical diversions should be approved, and
- (2) The Division should notify all existing users of the Carmel River subterranean stream who diverted water from 1994 or earlier and who were not previously notified of the creation of Table 13, that the SWRCB will consider water right applications for authorization of historic uses to give them an opportunity to be included in Table 13 for their established water use amounts.

¹ The Water Code provides, in part: "If the board provides notice to persons who file statements [of Water Diversion and Use], the notice shall not be determined to be inadequate on the basis that the notice was not received by any person . . . who fails to file a statement required to be filed . . ." (Wat. Code, § 5106, subd. b(3).) This provision did not take effect until 1998, however. Before 1998, a person who diverted and used water could challenge a water right proceeding for lack of notice, even though the lack of notice was the result of that person's failure to file a required statement of Water Diversion and Use. (See SWRCB Order WR 94-7.)

In effect, this action will give all existing well users in the Carmel River aquifer the ability to obtain a valid basis of right for water use which was occurring at the time the SWRCB first made its determination that the Carmel River aquifer is a subterranean stream flowing through known and definite channels and, therefore, subject to the permitting authority of the SWRCB. Further, this action will allow these applicants to acquire a water right for their historical uses despite the fully appropriated stream listing of the Carmel River.

6.0 CHUGACH & CO. (CHUGACH), RICHARD EVANS (EVANS), RONALD R. KOONTZ (KOONTZ), NOVELLA NICHOLSON (NICHOLSON), BRUCE AND BETH STERTEN (STERTEN)

Petitioners Chugach, Evans, Koontz, Nicholson, and Sterten are known collectively as the Carmel Valley Water Users. They request that the SWRCB amend the allotments in Table 13 as follows:

NAME	AMOUNT REQUESTED (AFA)	AMOUNT ALLOTTED (AFA)
Chugach	25.2	7.6
Evans	17.5	15.0
Koontz	14.4	0.7
Nicholson	5.1	2.2
Serten	11.2	5.1

The amount of water requested by each of the petitioners is the amount of water included in executed supplemental stipulations between the petitioners and the District. The Chief declined to amend the allotments to the petitioners because they were based on stipulated amounts not on well records. In transcripts of the July 6, 1995 Board Meeting at which D-1632 was considered for adoption, Division staff stated that new or revised stipulations with the District would be a basis for revising the allotment in Table 13. No mention was made of a requirement that the stipulation be based on well records. Condition 10 is silent regarding whether stipulations must be based on well records. In the absence of an express requirement that stipulations with the District be based on well records, the Table 13 allotments of the Carmel Valley Water Users should be amended to conform to the stipulations with the District.

7.0 COMPLIANCE WITH CEQA

This order does not approve any permit or otherwise authorize the diversion of water by any of the petitioners. The SWRCB will determine on a case-by-case basis what is necessary to comply with CEQA as applied to each application that it reviews pursuant to this order.

ORDER

IT IS HEREBY ORDERED THAT:

1. Wolter's Table 13 allotment shall be 62 afa.
2. The wells of Holt and Markkula extract percolating groundwater and are not subject to the permitting authority of the SWRCB. The applications filed to authorize diversions from Holt's wells and Markkula's wells in the Tularcitos basin shall be canceled and they shall be removed from Table 13.
3. The Temple and Homestead shall be included in Table 13. Their allotments in Table 13 are 8 afa and 18 afa, respectively.
4. The Division shall notify all existing users of the Carmel River subterranean stream who diverted water from 1994 or earlier and who were not previously notified concerning creation of Table 13, that the SWRCB will consider water right applications for authorization of historic uses to give them an opportunity to be included in Table 13 for their established water use amounts. The well users shall be advised to file an application by a date specified by the Chief of the Division of Water Rights (Chief). To be added to Table 13 and allowed to obtain a right, the applicant will be required to provide substantiation that the quantity of water for which a permit is being sought was diverted and used during the years 1987 through 1994. Only application amounts equal to or less than documented historic use during this period will be accepted. Only prima facie evidence in the form of well meter records, power consumption records, and in certain instances when the other records are not available, historic land use calculations based on methodology acceptable to the Chief and accompanied by aerial photographs documenting

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the extent of historic land use will be utilized to determine existing water use. The Chief is directed to rely solely on prima facie evidence, and shall not consider any new stipulations with the District in determining existing water use. Applications for a water right permit for diversions in excess of existing use will only be accepted for a diversion season between January 1 and April 30 (consistent with the Declaration of Fully Appropriated Streams). The Chief is delegated the authority to add applicants to Table 13 in accordance with the criteria set forth above.

5. The allotments in Table 13 for the Carmel Valley Water Users shall be: 25.2 afa for Chugach, 17.5 afa for Evans, 14.4 afa for Koontz, 5.1 afa for Nicholson, and 11.2 afa for Sterten.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 21, 2003.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

Maureen Marché
Clerk to the Board